STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CHARTER TOWNSHIP OF SHELBY,
a Municipal Corporation,

Plaintiff,

vs.

Case No. 2004-3151-AZ

PICCININI DEVELOPMENT, LLC,
a Limited Liability Company, SHELBY
PRECAST COMPANY, and CECILE SNAUWAERT
individually, and as agent of Shelby Precast
Company, Jointly and Severally,

Defendants,

and

PICCININI DEVELOPMENT, LLC,
a Limited Liability Company, SHELBY
PRECAST COMPANY,

Counter-Plaintiffs,

vs.

CHARTER TOWNSHIP OF SHELBY,

Counter-Defendant,

and

PICCININI DEVELOPMENT, LLC and
SHELBY PRECAST COMPANY,

Cross-Plaintiffs,

vs.

CECILE SNAUWAERT,

Cross-Defendants.

OPINION AND ORDER

Cross-defendant Cecile Snauwaert moves for summary disposition of the cross-claim. As defendant, Cecile Snauwaert renews her motion for summary disposition of the primary complaint against her.

Plaintiff Shelby Township filed its complaint on July 28, 2004, for injunctive relief. Plaintiff Township objects to the current use of certain property fronting 23 Mile Road, which is currently owned by defendant Piccinini Development Co. ("Piccinini"), and was owned by defendants Jean and Cecile Snauwaert at the time the alleged complained-of activity commenced. Plaintiff Township asserts that 14660 23 Mile Road was subdivided, creating from it 14670 23 Mile Road. Plaintiff contends that both are zoned L-M. Plaintiff asserts that defendant Jean and Cecile Snauwaert and Shelby Precast Company, owned by Jean Snauwaert, filed a site plan with Shelby Township's Planning and Zoning Department, wherein they proposed to construct a precast beam casting building at the complaint location; defendants received approval for that project on April 28, 1980. Subsequently, the Township alleges, defendants allowed building construction to take place which did not comport with the approved plans, which had been to construct an industrial "shell" building. Further, plaintiff alleges, the building never received the required building inspection approvals required by the then-prevailing Michigan Building Code. Additionally, plaintiff alleges, defendants have put other structures on the building that were not in the site plans and have not received various requisite certificates and approvals. Plaintiff Township alleges the Snauwaerts and Shelby Precast Company sold the disputed property in a bankruptcy proceeding, knowing full well that existing building code and zoning violations exist. Finally, plaintiff Township contends that the current

owner, defendant Piccinini, is occupying the building without receiving the required certificates, and its use and occupancy of the building and property is not a lawful-pre-existing conforming use. Plaintiff Township brings claims for nuisance per se (count I) and permanent injunction (count II).

Defendant Piccinini filed a counter-complaint on September 7, 2004. Piccinni avers it purchased the subject property in late 2002. Piccinni asserts that prior to sale, Shelby Precast had used the property as a manufacturing facility for precast structural concrete components. Piccinini asserts it is the Snauwaerts' successor-in-interest, and their company, Shelby Precast, had operated its business with the permission and approval of Shelby Township; Shelby Township did not take any action against the Snauwaerts or Shelby Precast during the period of time that it operated on the real property. Piccinini contends that Shelby Precast's use of the real property was an appropriate legal use of the subject property. Alternatively, Piccinini argues, Shelby Precast's operation of the business was a legal non-conforming operation. Piccinini maintains it is using the property in the same manner as Shelby Precast and has not expanded its use. Piccinini brings its claim for injunctive and declaratory relief, requesting the Court determine that its use is a legal use under the Shelby Township Zoning Ordinance.

Piccinini has brought a cross-complaint, and cross-defendants have answered same. Cross-plaintiffs bring a cross-complaint for breach of contract (count I); fraud (count II); negligent misrepresentation (count III); and silent fraud (count IV).[1]

The court will first consider Cecile Snauwaert's motion for summary disposition as to the cross-claim against her.[2] As a preliminary matter, Snauwaert relates the following as fact: prior to 1986, Jean and Cecile Snauwaert owned approximately 70 acres of real property fronting 23

[1] The cross-complaint is not found in the Court file.
[2] Defendant Jean Snauwaert has been dismissed, as he passed away in 2003.

Mile Road. In 1986, the Snauwaerts conveyed 69 acres of undeveloped land to the Jean Snauwaert Revocable Living Trust. Those 69 vacant acres were leased by the Trust to Shelby Precast. In 1989, the Snauwaerts conveyed 1.23 acres of developed land to Shelby Precast. According to Cecile Snauwaert, there was an industrial shell building on the 1.23 acres that housed the main "batch plant." In 2001, when Shelby Precast's business was suffering, Ned Piccinini, a precast concrete competitor, approached Jean Snauwaert, Shelby Precast's founder, about selling the precast concrete business, including all 70 acres, to him. Before a deal could be worked out, Shelby Precast filed Chapter 11 bankruptcy, on October 28, 2002. On November 22, 2002, Shelby Precast, as a Chapter 11 debtor, entered into an "Asset Purchase Agreement" with a newly formed entity owned by Ned Piccinini called "Nuova Precast of Shelby, LLC." Pursuant to that asset purchase agreement, Shelby Precast agreed to sell Nuova substantially all of its assets—the 1.23 acres with the shell building, etc.—on an "as is" basis. Snauwaert maintains the sale did not include Shelby Precast's stock and minute books. On November 26, 2002, Snauwaert maintains, Ned Piccinini's other newly formed entity, Ned Land Company, LLC, executed an "Offer to Purchase Real Estate" for the other 69 acres of vacant land. The sale was consummated that day.

Cecile Snauwaert contends that in making these arrangements, Ned Piccinini had intended to compete with his family's precast concrete business, namely, National Precast, Inc., Piccinini Bros., LLC and Piccinini Brothers, Inc. Snauwaert contends that when Piccinini's family learned of these transactions, Piccinini was terminated as Chairman of the Board of National Precast, Inc., and Piccinini Brothers, LLC, denounced his conduct. Snauwaert contends that Ned Piccinini then attempted to assuage things with his family by causing Nuova, on February 5, 2003, to assign all of its rights to acquire Shelby Precast's assets to National, and

caused Ned Land Company, LLC, to convey the 69 acres to Piccinini Development, LLC. According to Cecile Snauwaert, the closing on Shelby Precast's assets to National occurred in February of 2003, and Shelby Precast quitclaimed its interest in the 1.23 acres directly to National's affiliate, Puccini development, Inc.

In arguing for dismissal of the cross-complaint, Snauwaert argues, first, that "Shelby Concrete Company's" purported cross-claim should be dismissed pursuant to MCR 2.116(C)(5), lack of standing. Second, Snauwaert moves for summary disposition of Shelby Precast Company's cross-claim pursuant to MCR 2.116(C)(8) and (C)(10), arguing it is not a real party in interest. In this regard, Snauwaert contends that Shelby Precast Company is a "trade name" of National Precast, Inc., with no legally protected interest in jeopardy of being adversely affected.

Third, Snauwaert contends Ned Piccinini was not an "agent" for Piccinini Development, LLC, and therefore there is no support for a breach of contract claim. Fourth, Snauwaert argues, there were no contracts between Piccinini and Cecile Snauwaert; therefore, there is no breach of contract.

Fifth, Snauwaert argues that Piccinini Development, LLC's claims for fraud, negligent misrepresentation, and silent fraud fail as a matter of law. Here, Snauwaert attaches her affidavit, setting forth that she never made any misrepresentations of fact to Ned Piccinini or Piccinini Development, LLC. In this regard, Snauwaert avers that the only issue made known to her by the Township about the 69 acres was in 2000, when the Township told Jean that one tenant in the adjoining mobile home park had complained about some old equipment on part of the 69 acres. Snauwaert swears the problem was taken care of. Snauwaert swears she did not receive a letter purportedly sent by the Township to Cecile and Jean on November 25, 2002. Even still, Snauwaert contends, this letter does not pertain to the 69 acres but the industrial shell

building located on the 1.23 acres that were not conveyed to Ned Land Company, LLC, on November 26, 2002.

Cross-Plaintiff Piccinini Development, LLC, first stipulates to dismiss Shelby Precast Company as a party plaintiff.

Second, Piccinini contends that Snauwaert's argument that Ned Piccinini was not an agent for Piccinini, as well as the argument that there is no contract between Piccinini and Cecil Snauwaert, provide no basis for dismissing Piccinini Development's claims. In this regard, Piccinini contends that the purchase agreement entered into between the Snauwaerts and Ned Land Company, LLC, provided that the representations and warranties contained therein survive the closing and inure to the benefit of successors and assigns. Ned Piccinini, on behalf of Ned Land Company, assigned all rights to Piccinini Development. Thus, Piccinini Development, LLC, appropriately stands in the shoes of Ned Land Company, LLC, with respect to its valid claim for breach of the real estate purchase agreement, as well as its claims for fraud, negligent misrepresentation and silent fraud.

Third, Piccinini argues that it is a proper party in interest regarding the fraud claims, and there exist questions of material fact for trial. In this regard, Piccinini asserts as a preliminary matter that the "batch plant" is not on the 1.23 acres that were not conveyed to Ned Land Company, but is in fact at least in part located on the 69 acres that were. Again, Piccinini notes that it stands in the shoes of its predecessor, Ned Land Company, LLC, and that the written representations of fact made by Cecile Snauwaert in the "offer to Purchase Real Estate" specifically surviving the closing of the transaction. Piccinini maintains that Cecile Snauwaert represented to Ned Piccinini that there was no pending or threatened legal action, yet the Township's evidence confirms Snauwaert definitively had knowledge that the Township was

claiming ordinance violations and threatening legal action. Piccinini maintains it has suffered damages as a result of having to expend a substantial amount of money in defense of the action by the Township and will undoubtedly have to undergo efforts to remediate the property. Piccinini concludes that Snauwaert's self-serving affidavit creates questions of fact on its face.

Cecil Snauwaert moves for summary disposition of the cross-complaint pursuant to MCR 2.116(C)(8) and (C)(10).[3] A motion brought under MCR 2.116(C)(8) tests the sufficiency of the complaint on the basis of the pleadings alone. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). The trial court must grant the defendant's motion if no factual development could justify the asserted claim for relief. *By Lo Oil*, 26. A (C)(10) motion tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *By Lo Oil*, 26. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *By Lo Oil*, 26-27.

First, the Court is satisfied that defendant states a claim for breach of contract by Cecile Snauwaert.[4] Cecile Snauwaert asserts in her brief that on November 26, 2002, Ned Piccinini's newly-formed entity, Ned Land Company, LLC, executed an "Offer to Purchase Real Estate" for the other 69 acres of vacant land. As part of the closing, the Jean Snauwaert Trust conveyed the 69 acres back to Jean and Cecile. Minutes later, the 69 acres were conveyed to Ned Land Company, LLC. (Snauwaert's motion brief, p 4) The Offer to Purchase Real Estate, signed by

[3] Again, defendant Piccinini has agreed to dismiss Shelby Precast Company as a cross-plaintiff, and therefore the review standard for that issue is not necessary to recite.

the Trust, and Jean and Cecile Snauwaert individually, as seller, and Ned Land Company, LLC, as purchaser, includes at paragraph 17, the following language:

> 17. Entire Agreement; Successors and Assigns; Survival. . . . . This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and permitted assigns. All of the representations, covenants and agreements made by Seller under this Agreement shall survive the Closing. . . .

Cecile Snauwaert does not dispute that Ned Land Company, LLC conveyed the 69 acres to Piccinini Development, Ltd., i.e., that Piccinini is the assignee of Ned Land Company. The only question is whether, as assignee, Piccinini may bring a breach of contract claim.

Causes of action for breach of contract, where the contract is not personal, are assignable. *Barlow v Lincoln-Williams Twist Drilling Co,* 186 Mich 46, 48; 152 NW 1034 (1915). The assignee stands in the shoes of the assignor; where the assignor possessed a right to sue for breach of contract, the assignee now possesses such right. *Professional Rehabilitation Assoc v State Farm Mut Auto Ins Co,* 228 Mich App 167, 177; 577 NW2d2d 909 (1998). In this case, the contract, as set forth above, unambiguously provides that the agreement is to inure to the benefit of the parties and their successors and assigns. Further, all representations shall survive the closing. Where the terms of the purchase agreement anticipate and permit an assignment, the Court is persuaded that the assignee may bring a claim based on the contract that the assignor would have. The Court is therefore persuaded that cross-plaintiff Piccinini states a claim for breach of contract.

Second, the Court is persuaded that cross-plaintiff Piccinini states and supports the claims for fraud, negligent misrepresentation and silent fraud. Here, Cecile Snauwaert contends she never made any misrepresentations to Ned Land Company, LLC, which "survived" the transfer to Piccinini Development, LLC; Snauwaert contends she made no misrepresentations to anyone.

[4] Regarding the breach of contract claim, Snauwaert moves pursuant to MCR 2.116(C)(8) only.

Specifically, Snauwaert attaches her affidavit in which she swears that on the date of sale, the only sort of threatened legal action she was aware of had concerned one tenant in the adjoining mobile home park who had complained about some old equipment on part of the 69 acres. Snauwaert swears that incident occurred in 2000, and she was under the belief the matter was resolved. First, as stated, Piccinini has standing as assignee in this case; Snauwaert does not dispute that Ned Land Company, LLC, would have had standing to bring the tort claims. Second, Piccinini has provided some evidence that Snauwaert had been notified by the Township that an enforcement action might be undertaken. Piccinini presents a letter dated November 25, 2002 (the day before the real estate contract was signed), from the Township to Jean and Cecile Snauwaert, advising that the building inspector had been authorized to proceed with enforcement action against them for the unlawful construction of the industrial building. (Ex B) The letter further reads that the matter had initially been addressed "[s]ome time ago," but progress towards a resolution seemed to have stalled. Thus, evidence is presented to create a question of fact that Cecile Snauwaert made misrepresentations concerning the subject property. Therefore, Cecile Snauwaert's motion for summary disposition of the cross-complaint is denied.

The Court will now consider Snauwaert's renewed motion for summary disposition of the primary complaint against her. Snauwaert moves pursuant to MCR 2.116(C)(3) (improper service) and (C)(10). Defendant Snauwaert contends that plaintiff failed to satisfy the requirements of MCR 2.105, constituting a technical defect in the manner of process requiring dismissal of plaintiff's complaint. Second, defendant Snauwaert asserts that because she had and has no alleged or actual right, title or interest in the real property which forms the subject of this dispute, there is no genuine issue of material fact to preclude summary disposition.

With regard to the service of process, defendant asserts plaintiff mailed a copy of the summons and complaint via certified mail, return receipt requested, but not restricted delivery. Defendant attaches the exhibit showing that her son actually signed the "green card." Defendant asserts plaintiff then submitted a "Return of Service" indicating that she had supposedly been served on July 30, 2004, even though she had not signed the card. Defendant notes the summons expired on October 27, 2004. Defendant asserts this constitutes a complete failure of service, and not merely a defect of same, because she had no notice of the lawsuit before the summons expired.

With regard to the substance of plaintiff's complaint, Snauwaert alleges that summary disposition is appropriate because she is not alleged to have, and does not have, any right, title or interest in the real property. In this regard, defendant notes plaintiff's complaint requests a declaration that certain activities on real property not belonging to defendant are a nuisance and an order prohibiting certain conduct on that property.

Plaintiff Township responds that it filed its action on July 28, 2004, and served each defendant with the summons and complaint by way of certified, registered mail. Ken Snauwaert signed the green cards demonstrating proof of service on July 30, 2004. When the Snauwaerts failed to file a timely response, on November 16, 2004, the Township filed an entry of default and served it upon the Snauwaerts via first class mail to the same address as the summons and complaint. On November 17, 2004, Snauwaert's attorney contacted the Township by telephone, and the Township stipulated to set aside the default. The Township asserts it gave Snauwaerts' attorney all pleadings filed in this action by first class mail on November 18, 2004. Subsequently, on December 21, 2004, the Township received the Snauwaerts' initial motion for summary disposition, alleging the same service of process defect. The Township contends

Cecile Snauwaert has acknowledged receiving the summons and complaint by retaining counsel and filing a motion for summary disposition. Moreover, the Township notes, defendant has spent the last year participating in this litigation. The Township argues that Cecile Snauwaert has not been prejudiced because she received notice of the instant action within the time period set by law and she has presented defenses and fully participated in this litigation. Second, the Township asserts it agreed to stipulate to entry of an order setting aside the entry of default against Cecile Snauwaert with the presumption that she would not contest service of process. Third, the Township avers that Cecile's attorney, on her behalf, submitted to this Court's jurisdiction and made a general, not limited, appearance, and therefore waived arguments for dismissal based upon an alleged failure of notice.

With regard to the substance of the complaint, the Township asserts that legal precedent holds that a party need not have a current interest in property but must simply have created the nuisance condition during ownership in order to be held liable in a nuisance action.

Interpretation of the court rules is reviewed de novo. *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002). The rules governing statutory interpretation apply equally to the interpretation of court rules. *Hyslop*, 505. If the plain and ordinary meaning of the language employed is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used. *Hyslop*, 505. A trial court's ruling on a motion for summary disposition is reviewed de novo. *Hyslop*, 505.

MCR 2.105(J)(3) provides that "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." The principal dispute between the parties is whether this case involved

"improper service of process" or a complete failure of service of process. The importance of the distinction is discussed in *Holliday v Townley,* 189 Mich App 424; 473 NW2d 733 (1991). In *Holliday,* the plaintiff filed a complaint and sent a copy to the defendant with a cover letter. The defendant was never served with or received a summons. The summons expired, and the limitation period expired. The trial court dismissed the action for failure to serve the defendant. On appeal, the plaintiff relied on MCR 2.105(J)(3) and argued that the defendant had actual notice of the lawsuit. This Court concluded that MCR 2.105(J)(3) was inapplicable "where the question is not one of defects in the manner of service, but rather a complete failure of service of process." *Holliday*, 425. The Court stated that the rule "forgives errors in the manner or content of service of process. It does not forgive a failure to serve process." *Holliday*, 426. The summons is a necessary part of service of process. "MCR 2.105(J)(3), as well as every other court rule governing service of process, assumes that the summons will be served with the complaint, even if in a technically defective fashion." *Holliday*, 426. The Court in *Holliday* concluded that there was a complete failure of service of process and, therefore, affirmed the dismissal of the action.

In contrast to *Holliday, Hill v Frawley,* 155 Mich App 611; 400 NW2d 328 (1986) is an example of an error in the manner of service to which MCR 2.105(J)(3) applies. In *Hill,* the plaintiff filed a complaint and attempted to serve it by certified mail, but did not enclose a copy of the complaint. He made a second attempt to serve the defendant, but someone other than the defendant signed the return receipt. The defendant filed a motion for summary disposition on the basis that process and service were insufficient. The motion was filed before the summons expired. Although the service did not comply with MCR 2.105(A)(2), this Court relied on MCR 2.105(J)(3) to conclude that the defendant was not entitled to summary disposition. "[I]f a

defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Hill*, 613. In *Hill,* the defendant acknowledged receiving the summons and complaint within the pertinent time period by retaining counsel and filing a motion for summary disposition. *Hill*, 613-614.

The Court is forced to conclude that the present case involves a complete failure of service rather than an error in service. Pursuant to MCR 2.105(a)(2), process may be served on a resident individual by "sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, *and* delivery restricted to the addressee." (Emphasis added.) Defendant Snauwaert attaches a copy of the return receipt "green card," which reveals that it was not signed by Cecile Snauwaert but by Ken Snauwaert. In Box #4, "Restricted Delivery?" The "yes" box is left empty. (Def Ex J) The summons and complaint expired on October 27, 2004. (Def Ex L) Defendant Snauwaert further attaches her affidavit in which she swears that she has never authorized her son to act as her agent in receiving legal papers, to sign a green card, or acknowledge service, etc. (Def Ex M) Defendant further asserts her son did not give her those papers or disclose their contents until November 16, 2004. November 16, 2004, is the date that the Township filed a default entry and sent it by first class mail to defendant's address. Her attorney responded for the first time in this litigation the next day. While plaintiff Township asserts that under MCR 2.105(J)(3) an action shall not be dismissed unless the service failed to inform the defendant of the action within the time provided in these rules for service, and that the "pendency period for service is statutorily set at 182 days," as per MCR 2.102(D), MCR 2.102(D) has been amended. Since 1991, the time for expiration of a summons was shortened from 182 days to 91 days. Again, defendant had not responded in this action until after

expiration of the summons. There is no evidence defendant had other knowledge of this action until then, such as specific communication with the Township about the pending litigation. Therefore, the Court is persuaded dismissal is appropriate. In light of this conclusion, the Court need not reach the remaining issue.

For the foregoing reasons, cross-defendant Cecile Snauwaert's motion for summary disposition of the cross-complaint is DENIED. Defendant Cecile Snauwaert's renewed motion for summary disposition of the complaint as against her is GRANTED. Snauwaert is DISMISSED WITHOUT PREJUDICE from the primary complaint. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: MAY 18 2006

DMD/aac

cc: Robert Huth Jr., Esq.
C. William Garrett, Esq
James J. Sarconi, Esq

DIANE M. DRUZINSKI
CIRCUIT JUDGE

MAY 18 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ COUNTY CLERK